Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors

HIGH COURT (MELAKA) — CIVIL SUIT NO 22–46 OF 1995
AUGUSTINE PAUL JC
24 FEBRUARY 1997

Companies and Corporations *— Shares — Dealing by company in its own shares — Whether company giving direct or indirect financial assistance to third party to acquire its shares — Whether the giving of financial assistance rendered the transaction void and unenforceable — Effect of unlawful giving of financial assistance on acquisition of shares by third party — Companies Act 1965 s 67(1) & (6) — Contracts Act 1950 s 24*

Contract *— Illegality — Contravention of law — Breach of s 67 of the Companies Act 1965 — Whether such contract enforceable — Whether contract saved by s 67(6) of the Companies Act 1965 — Contracts Act 1950 s 24*

Evidence *— Parol evidence rule — Whether prohibition in s 92 of the Evidence Act 1950 applied only to bilateral and dispositive documents — Whether prohibition applicable to return of allotment of shares to Registrar of Companies — Evidence Act 1950 ss 91 & 92*

Words and Phrases *— 'Financial assistance' — Companies Act 1965 s 67(1)*

The plaintiff and two other persons were shareholders of Sarjana Sdn Bhd ('the first defendant') which had a paid-up capital of 5,700 ordinary shares. The plaintiff used the first defendant as a vehicle to purchase 132.7072 acres of land by an agreement dated 8 June 1992. On 19 June 1992, the first defendant entered into an agreement ('the agreement') with Pasti Hasil Sdn Bhd ('the second defendant') to resell the land to the latter. According to the agreement, RM1m of the purchase consideration will be capitalized as paid-up capital for 1m shares in the first defendant. These 1m shares had been allotted to the second defendant pursuant to a resolution passed by the first defendant at its extraordinary general meeting on 22 June 1992. The plaintiff commenced this action seeking declarations to render the allotment of the shares to the second defendant void. The plaintiff alleged that there was contravention of s 67 of the Companies Act 1965 ('the Act') because the first defendant had provided financial assistance to the second defendant to subscribe to the shares of the first defendant. Among the issues for determination were: (i) whether the plaintiff as a shareholder of the first defendant had the capacity in law to bring a claim against the first and second defendants based on the alleged contravention of s 67 of the Act when the aforesaid section afforded protection only to the first defendant and no one else; (ii) whether the first defendant had directly or indirectly given financial assistance to the second defendant for the purpose of the latter's subscription of the 1m ordinary shares in the former in

contravention of s 67 of the Act; and (iii) the validity of a subscription of shares made in a company pursuant to the company itself providing financial assistance for the transaction, in contravention of s 67 of the Act. The plaintiff also contended that the return of allotment of shares to the Registrar of Companies, being a statutory requirement, fell within the ambit of ss 91 and 92 of the Evidence Act 1950 and therefore the entries contained therein, which showed that the 1m ordinary shares of RM1 each were allotted to the second defendant for which the amount paid was RM1 per share, could not be contradicted to show that the shares had been allotted to the second defendant on a fully paid-up basis.

Held, dismissing the plaintiff's claim with costs:

(1) According to s 67(6) of the Act, only the company had the locus standi to institute an action in respect of a transaction entered into in contravention of s 67(1) of the Act. Therefore the plaintiff had no locus standi to bring this action (see p 359F).

(2) The prohibition in s 67 of the Act was on the company giving, in any way, any financial assistance for the purpose of or in connection with a purchase of or subscription made or to be made by any person for any shares in the company. However, if the transaction was a bona fide commercial transaction entered into in good faith, the fact that the proceeds of the transaction were used to assist in acquiring the company's shares would not make the transaction illegal. In this case, the first defendant financially assisted the second defendant to acquire the 1m shares as the transaction that they entered into resulted in the second defendant obtaining the shares without any payment by reason of RM1m accruing from the sale of the land being treated as payment for the shares. The transaction was not a transaction whereby the first defendant acquired anything which it genuinely needed for its own purpose. It was a transaction which facilitated the second defendant's acquisition of control of the first defendant for its own purpose (see p 350C–G); *EH Dey Pty Ltd (In liquidation) v Dey* [1966] VR 464 and *Belmont Finance Corp v Williams Furniture Ltd & Ors (No 2)* [1980] 1 All ER 393 followed.

(3) A contract which was prohibited by statute did not become void and unenforceable if the statute itself saved the contract or there were contrary intentions which could reasonably be read from the language of the statute itself. As s 67(3) of the Act prescribed penalties for a breach of s 67(1) and s 67(6) provided remedies for the breach and furthermore, having regard to the context and purpose of s 67(1), any transaction entered into in breach of the section was valid and enforceable. Thus the agreement in this case did not become void and unenforceable. In any event, s 67(1) of the Act only prohibited the giving of financial assistance

for the acquisition of shares and not the acquisition of the shares itself which was the transaction which the plaintiff sought to have declared void (see p 352E–G); *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356, *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, *Phoenix General Insurance Co of Greece SA v Adas* [1987] 2 All ER 152 and *Co-oprative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313 followed; *Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Co* [1990] 1 MLJ 485 and *Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors* [1981] 2 MLJ 114 not followed.

(4) Section 92 of the Evidence Act 1950 did not apply to all documents that come within s 91. The prohibition contained in s 92 applied only to bilateral and dispositive documents.The section had no application to unilateral and non-dispositive documents such as police reports and as a consequence thereof, oral evidence is admissible to contradict them. Since the return of allotment of shares was a unilateral document, it therefore could be contradicted if the facts warranted it (see p 347A–C); *PP v Datuk Haji Harun bin Idris & Ors* [1977] 1 MLJ 180, *D-G of Inland Revenue v Ee Sim Sai* [1977] 2 MLJ 32 and *Bai Hira Devi v Official Assignee, Bombay* AIR 1958 SC 448 followed; *Ah Mee v PP* [1967] 1 MLJ 220 not followed.

[Bahasa Malaysia summary

Plaintif dan dua orang lagi merupakan pemegang saham Sarjana Sdn Bhd ('defendan pertama') yang mempunyai kapital berbayar sebanyak 5,700 saham biasa. Plaintif telah menggunakan defendan pertama sebagai alat untuk membeli 132.7072 ekar tanah melalui suatu perjanjian bertarikh 8 Jun 1992. Pada 19 Jun 1992, defendan pertama telah mengikat suatu perjanjian ('perjanjian tersebut') dengan Pasti Hasil Sdn Bhd ('defendan kedua') untuk menjual semula tanah tersebut kepada defendan kedua. Menurut perjanjian tersebut, RM1 juta daripada balasan pembelian itu akan dipermodalkan sebagai modal terbayar untuk sejuta saham dalam defendan pertama. Sejuta saham ini telah diperuntukkan kepada defendan kedua menurut resolusi yang diluluskan oleh defendan pertama di mesyuarat agung luar biasa pada 22 Jun 1992. Plaintif telah memulakan tindakan ini memohon dekalarasi untuk membatalkan peruntukan saham kepada defendan kedua. Plaintif mendakwa bahawa terdapat pelanggaran s 67 Akta Syarikat 1965 ('Akta tersebut') kerana defendan pertama telah memberikan bantuan kewangan kepada defendan kedua untuk membeli saham defendan pertama. Di antara isu untuk dipertimbangkan adalah: (i) sama ada plaintif sebagai pemegang saham defendan pertama mempunyai keupayaan dari segi undang-undang untuk membawa tuntutan terhadap defendan pertama dan kedua berdasarkan pelanggaran s 67 Akta tersebut, padahal seksyen

tersebut memberikan perlindungan cuma kepada defendan pertama sahaja dan tiada sesiapa yang lain; (ii) sama ada defendan pertama secara langsung atau tidak langsung telah memberikan bantuan kewangan kepada defendan kedua untuk tujuan permohonan belian sejuta saham biasa dalam defendan pertama, iaitu suatu pelanggaran s 67 Akta tersebut; dan (iii) kesahan permohonan belian saham dalam sesuatu syarikat di mana syarikat tersebut memberikan bantuan kewangan untuk transaksi tersebut, yang merupakan suatu pelanggaran s 67 Akta tersebut. Plaintif juga telah berhujah bahawa laporan peruntukan saham tersebut kepada Pendaftar Syarikat, yang merupakan suatu keperluan statut, adalah tertakluk kepada ss 91 dan 92 Akta Keterangan 1950 dan oleh itu pernyataan di dalamnya, yang menunjukkan bahawa sejuta saham biasa pada kadar RM1 setiap satu telah diperuntukkan kepada defendan kedua yang mana jumlah yang dibayar adalah RM1 setiap saham, tidak dapat disangkal untuk menunjukkan bahawa saham tersebut telah diperuntukkan kepada defendan kedua atas dasar saham berbayar penuh.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Menurut s 67(6) Akta tersebut, hanya sesebuah syarikat yang mempunyai locus standi untuk memulakan suatu tindakan berkenaan dengan transaksi yang dimasuki yang melanggar s 67(1) Akta tersebut. Oleh itu plaintif tidak mempunyai locus standi untuk membawa tindakan ini (lihat ms 359F).

(2) Larangan dalam s 67 Akta tersebut adalah berkaitan dengan sesuatu syarikat memberi, dalam apa-apa cara, sebarang bantuan kewangan untuk tujuan ataupun berkaitan dengan pembelian atau permohonan belian yang dibuat ataupun yang akan dibuat oleh sesiapapun untuk apa-apa saham dalam syarikat itu. Walau bagaimanapun, jikalau transaksi tersebut adalah suatu transaksi komersial yang bona fide yang telah dimasuki secara suci hati, hakikat bahawa hasil transaksi tersebut digunakan untuk membantu memperolehi saham syarikat tidak akan membuatkan transaksi itu menyalahi undang-undang. Dalam kes ini, defendan pertama telah telah membri bantuan kewangan kepada defendan kedua untuk membeli sejuta saham itu kerana transaksi yang dimasuki itu berkesudahan dengan defendan kedua memperolehi saham-saham itu tanpa apa-apa bayaran memandangkan yang RM1 juta yang berpunca daripada jualan tanah itu disifatkan sebagai bayaran untuk saham-saham itu. Transaksi tersebut bukanlah transaksi di mana defendan pertama mendapatkan apa-apa yang ianya benar-benar perlukan untuk tujuannya sendiri. Ianya adalah suatu transaksi yang membolehkan pengambilan kuasa dalam defendan pertama oleh defendan kedua untuk tujuannya sendiri (lihat ms 350C–G); *EH Dey Pty Ltd (In*

A *liquidation) v Dey* [1966] VR 464 dan *Belmont Finance Corp v Williams Furniture Ltd & Ors (No 2)* [1980] 1 All ER 393 diikut.

(3) Suatu kontrak yang dilarang oleh statut tidak akan menjadi terbatal dan tidak dapat dikuatkuasakan jikalau statut itu dengan sendirinya menyelamatkan kontrak tersebut ataupun terdapat niat bertentangan yang dapat dibaca secara munasabah dari bahasa statut tersebut. Oleh kerana s 67(3) Akta tersebut menetapkan penalti untuk pelanggaran s 67(1) dan s 67(6) memperuntukkan remedi untuk pelanggaran tersebut dan selanjutnya, memandangkan konteks dan tujuan s 67(1), maka sebarang transaksi yang dimasuki yang melanggar seksyen tersebut adalah sah dan boleh dikuatkuasakan. Dengan itu perjanjian di dalam kes ini tiak menjadi terbatal dan tidak dapat dikuatkuasakan. Apa sekalipun, s 67(1) Akta tersebut cuma melarang pemberian bantuan kewangan untuk pembelian saham dan bukan pembelian saham sendirinya yang merupakan transaksi yang plaintif ingin diisytiharkan terbatal (lihat ms 352E–G); *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356, *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, *Phoenix General Insurance Co of Greece SA v Adas* [1987] 2 All ER 152 dan *Co-oprative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313 diikut; *Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Co* [1990] 1 MLJ 485 dan *Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors* [1981] 2 MLJ 114 tidak diikut.

(4) Seksyen 92 Akta Keterangan 1950 tidak terpakai kepada kesemua dokumen yang termasuk dalam s 91. Larangan yang terdapat dalam s 92 hanya terpakai kepada dokumen dwipihak ataupun dokumen pelupusan. Seksyen tersebut tidak terpakai kepada dokumen satu pihak dan dokumen bukan pelupusan seperti laporan polis dan berikutan itu, keterangan lisan boleh diterimamasuk untuk menyangkalnya. Oleh kerana laporan peruntukan saham adalah dokumen satu pihak, maka ianya boleh disangkal jika fakta membolehkannya (lihat ms 347A–C); *PP v Datuk Haji Harun bin Idris & Ors* [1977] 1 MLJ 180, *D-G of Inland Revenue v Ee Sim Sai* [1977] 2 MLJ 32 dan *Bai Hira Devi v Official Assignee, Bombay* AIR 1958 SC 448 diikut; *Ah Mee v PP* [1967] 1 MLJ 220 tidak diikut.]

Notes

For a case on the applicability of the parol evidence rule, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1270.

For cases on companies dealing with its own shares, see 3 *Mallal's*

Digest (4th Ed, 1994 Reissue) paras 319–321.

For cases on the enforceability of illegal contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1749–1752.

Cases referred to

Ah Mee v PP [1967] 1 MLJ 220 (not folld)
Bai Hira Devi v Official Assignee AIR 1958 SC 448 (folld)
Baker v R [1975] AC 774 (refd)
Batu Pahat Bank Ltd, The v The Official Assignee of the Property of Tan Keng Tin (a bankrupt) [1933] MLJ 237 (refd)
Belmont Finance Corp v Williams Furniture Ltd Ors (No 2) [1980] 1 All ER 393 (folld)
Burton v Palmer [1980] 2 NSWLR 878 (refd)
Carney v Herbert [1985] AC 301 (refd)
Charterhouse Investment Trust Ltd & Ors v Tempest Diesels Ltd [1989] BCLC 1 (refd)
Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd [1990] 2 MLJ 365 (refd)
Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356 (folld)
Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd [1995] 3 MLJ 313 (folld)
Co-operative Central Bank Bhd v Sykt Bukit Tinggi & Ors [1991] 1 CLJ 590 (refd)
Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd [1994] 1 MLJ 369 (refd)
D-G of Inland Revenue v Ee Sim Sai [1977] 2 MLJ 32 (folld)
EH Dey Pty Ltd (In liquidation) v Dey [1966] VR 464 (folld)
Eushun Properties Sdn Bhd v MBf Finance Bhd [1992] 2 MLJ 137 (refd)
Exchange Banking Co (Flitcroft's case), Re (1882) 21 Ch D 519 (refd)
Herchun Singh & Ors v PP [1969] 2 MLJ 209 (refd)
Inspector General of Police & Anor v Alan Noor bin Kamat [1988] 1 MLJ 260 (refd)
Intraco Ltd v Multi-Pak Singapore Pte Ltd [1995] 1 SLR 313 (refd)
Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd [1984] 1 MLJ 243 (refd)
Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Co [1990] 1 MLJ 485 (not folld)
Lee Chua v Mustafa bin Osman [1996] 1 AMR 680 (refd)
Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors [1981] 2 MLJ 114 (not folld)
PP v Datuk Haji Harun bin Idris & Ors [1977] 1 MLJ 180 (folld)
PP v Krishnan a/l Letchumanan & Anor [1995] 2 MLJ 690 (refd)
PP v Lee Eng Kooi [1993] 2 MLJ 322 (refd)
PP v Sulaiman bin Mohamed Noor [1996] 1 MLJ 196 (refd)
Pavone v PP [1986] 1 MLJ 72 (refd)
Phoenix General Insurance Co v Adas [1987] 2 All ER 152 (folld)
R v Warner (1661) 1 Keb 66 (refd)

Rossfield Group of Operations Pty Ltd v Austral Group Ltd [1981] Qd R 279 (refd)
Sajan Singh v Sardara Ali [1960] MLJ 52 (refd)
Spink (Bournemouth) Ltd v Spink [1936] 1 All ER 597 (refd)
Tinsley v Milligan [1993] 3 All ER 65 (refd)
Wai Hin Tin Mining Co Ltd v Lee Chow Beng [1968] 2 MLJ 251 (refd)
VGM Holdings Ltd, Re [1942] 1 All ER 224 (refd)
Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410 (folld)

Legislation referred to

Companies Act 1965 ss 67(1), (3), (6), 133(1), (5), 369(1)(a), (2)
Companies Ordinance (No 155) [Straits Settlements] s 111
Contracts Act 1950 s 24
Evidence Act 1950 ss 91, 92
Interpretation Acts 1948 and 1963 s 68

Yau Jiok Hua (*Hazudin bin Hashim* with him) (*Yau Jiok Hua & Co*) for the plaintiff.
Prasad Abraham (*Jenny Cheong Yee Bing* with him) (*Prasad Abraham & Associates*) for the first and second defendants.
Marridzuan bin Mohamad (*Jargit & Partners*) for the third, fourth and fifth defendants.

Augustine Paul JC: The preponderant issue for adjudication in this case is the validity of a subscription for shares made in a company pursuant to the company itself providing financial assistance for the transaction in contravention of s 67 of the Companies Act 1965 ('the Act').

Datuk Tan Leng Teck, the plaintiff, was an advocate and solicitor practising under the name and style of Tan & Co. He and two other persons named Tan Guat Ngo and Tan Bock Chuan were the shareholders of a company called Sarjana Sdn Bhd ('the first defendant') which had a paid-up capital of 5,700 ordinary shares of RM1 each. The plaintiff described the first defendant as 'my' company and said that he used it as a vehicle to purchase 132.7072 acres of land in the Mukim of Krubong, District of Melaka Tengah, State of Melaka and known as Lot No 942 held under Geran No Pendaftaran 3385 ('the land') from one Sin Hong Teng Co Sdn Bhd by an agreement dated 8 June 1992. The agreement disclosed that the purchase price of the land was RM4,910,166 and that the solicitors for the vendors were Tan & Co. Eleven days later, that is to say, on 19 June 1992, the first defendant entered into an agreement with Pasti Hasil Sdn Bhd ('the second defendant') to re-sell the land to the latter at a price of RM15,896,995.

It is necessary to reproduce some of the salient clauses in the agreement entered into between the first and second defendant who is described as the 'developer' in the agreement. They are:

1.0 *Consideration*

1.1 In consideration of the sum of Ringgit Malaysia Fifteen million eight hundred and ninety six thousand nine hundred ninety five only (RM15,896,995)('the consideration sum') to be paid by the developer to SARJANA in the manner set out in cl 4.1 hereof, SARJANA hereby agrees to sell and the developer agrees to purchase the project land with vacant possession and free from all encumbrances but subject to all conditions of title whether express or implied, if any, affecting the project land and subject to all terms and conditions hereinafter contained.

2.13 That upon payment of Ringgit Malaysia Three million and three hundred thousand only (RM3.3m) being part of the consideration sum by the developer, SARJANA will capitalize as paid-up capital the sum of Ringgit Malaysia One million only (RM1m).

4.0 *Payment of consideration*

4.1 The consideration of Ringgit Malaysia Fifteen million eight hundred and ninety six thousand nine hundred and ninety five only (RM15,896,995) shall be paid by the developer in the manner and within the time as follows:

(a) the sum of Ringgit Malaysia Three million and three hundred thousand only (RM3.3m) shall be paid to SARJANA upon execution of this agreement pursuant to cl 4.2.

4.2 All sums payable by the developer shall be deposited with Wan Sufian & Co, Advocates & Solicitors, 6th Floor Wisma Yakin, Jalan Masjid India, 50100 Kuala Lumpur, who are hereby authorized to release Ringgit Malaysia Three million and three hundred thousand only (RM3.3m) to Tan & Co, Advocates & Solicitors, No 2 Lorong Gereja, Melaka ('the stakeholders') for fulfilment of the conditions stipulated in cl 3:

(a) the sum of Ringgit Malaysia One million only (RM1m) to be released directly to SARJANA for the purpose of increasing its paid-up capital to be subscribed solely by the developer.

The sum of RM3.3m as agreed was duly paid by Wan Sufian & Co to the plaintiff's legal firm of Tan & Co on 22 June 1992. The plaintiff banked in the money into his clients' account the following day. The bank statement to establish the payment-in was marked as exh P3 by consent. That was the only sum received from Wan Sufian & Co. Tan & Co then wrote to the first defendant saying that they had received the sum of RM3.3m. The material parts of the letter which was marked as exh P4 by consent read as follows:

Our Ref: TLT/151/89/Amy

Date: 22 June 1992

The Board of Directors
Sarjana Sdn Bhd
26 Jalan Laksamana
75000 Melaka

Dear Sir,

SARJANA SDN BHD

We refer to the Malayan Banking Bhd, Kuala Lumpur Bank Draft No 150363 dated 22 June 1992 for the sum of RM3.3m remitted to our firm's client account.

We would advise that out of the above total amount of RM3.3m, an amount of RM1m is in respect of share application money received from PASTI HASIL SDN BHD in connection with an application for 1m ordinary shares of RM1 each fully paid in Sarjana Sdn Bhd. The above amount of RM3.3m together with a further amount of RM2m yet to be released by Kewangan Usaha Bersatu Bhd making a total sum of RM5m being part payment of the total purchase price of the land known as Lot 942 held under Grant No 003385, Mukim of Krubong, District of Melaka Tengah, State of Melaka and other expenses thereof.

In elaborating on the payments referred to in exh P4, the plaintiff said in his evidence:

> The payment in P4 refers to the payment made pursuant to P1. The second para means that out of the RM3.3m, RM1m is to be *treated* as payment for the second defendant's subscription of 1m shares in the first defendant. (Emphasis added.)

The 1m shares in the various communications that I have adverted to had been alloted to the second defendant pursuant to a resolution passed by the first defendant at its extraordinary general meeting held on 22 June 1992. The material parts of the minutes of that meeting read as follows:

SARJANA SDN BHD

(Incorporated in Malaysia)

MINUTES OF EXTRAORDINARY GENERAL MEETING

Date & time:	22 June 1992 at 10am
Place:	26, Jalan Laksamana, 75000 Melaka
Present:	Datuk Tan Leng Teck — Chairman Madam Tan Guat Ngo Madam Tan Bock Chuan
In attendance:	Mr Loh Sze Kiong) Madam Tan Guat Ngo) secretaries

(1) CHAIRMAN

Datuk Tan Leng Teck was elected to chair the meeting.

(2) NOTICE

The notice convening the meeting was tabled and read by the Chairman.

(3) ISSUED AND PAID-UP CAPITAL

The Chairman informed the meeting that in conjunction with the expansionary programme of the company, it was agreed that the company

should increase its issued and paid-up capital from 5,700 ordinary shares of RM1 each fully paid, to 1,005,700 ordinary shares of RM1 each fully paid by the additional allotment of 1m ordinary shares of RM1 each fully paid in the capital of the company.

Accordingly, the following ordinary resolution was put to vote and was duly approved as follows:

(4) ALLOTMENT OF SHARES

RESOLVED THAT the application for 1m ordinary shares of RM1 each fully paid in the company be and is hereby approved and allotted to the undermentioned company:

Name	No of shares
PASTI HASIL SDN BHD	1m ordinary shares of RM1 each fully paid.

FURTHER RESOLVED THAT the secretary be authorized to issue share certificates to the above company, sign the same with any one director, and to use and affix the common seal thereon.

In cross-examination, the plaintiff said that he chaired the meeting that passed the resolution and that the purpose of the sale of the shares '... was for the expansion of the first defendant'. Learned counsel for the defendants also referred the plaintiff to p 24 of exh B which contains a copy of the resolution forwarded to the Registrar of Companies. He was also referred to the return of allotment of shares at p 25 of exh B. The plaintiff agreed that these documents show that the shares were fully paid up before 23 June 1992.

Loh Sze Kiong, the secretary of the first defendant, said in his evidence:

> The shares were allotted on 22 June 1992 for 1m shares at RM1 each. With regard to the manner of payment for these shares I relied on a letter dated 22 June 1992 from Tan & Co (exh P4) and an enclosed photostat copy of a bank draft for a sum of RM3.3m. Exhibit P4 identified. There was no other payment made for the allotment of these shares. The persons in charge of the first defendant at that time were PW1 and I.

At the close of the case for the plaintiffs, the defendants elected not to call any evidence. The issues for determination as agreed by the parties are as follows:

(1) whether the plaintiff as a shareholder of the first defendant has the capacity in law to ground a claim against the first and second defendants as pleaded based on the alleged contravention of s 67 of the Act, when the aforesaid section affords protection to the first defendant and no one else;

(2) whether the first defendant has directly or indirectly given financial assistance to the second defendant for the purpose of the latter's

A subscription of 1m ordinary shares in the latter, in contravention of s 67(1) of the Act;

(3) whether, even if the answer to the first question is in the affirmative, the issue of the 1m ordinary shares in the first defendant to the second defendant was null and void; and

B (4) whether, if the said issue of the said shares was null and void, the defendants have made out a case for the validation of the said issue of the said shares by the court under s 63 of the Act.

In his submission, learned counsel for the plaintiff contended that out of the payment of RM3.3m, RM1m was used to increase the paid-up capital C of the first defendant. He said that this amounted to the first defendant providing financial assistance to the second defendant to subscribe for the shares in breach of s 67(1) of the Act thereby rendering the allotment of the shares null and void. In support of this, he relied on *Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors* [1981] 2 MLJ 114 and D *Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Co* [1990] 1 MLJ 485, both being judgments of the Federal Court. He referred to exh P4 to show that the RM1m was in fact used for the purpose as claimed by the plaintiff. He added that the fact that the RM1m was not physically paid was irrelevant. The fact remains that the sum of RM3.3m belonged to the first defendant and that out of this sum, RM1m was to be treated as payment E for the shares. He added that the entries in the return of allotment of shares where it is stated that:

(a) the number of shares allotted to the second defendant was 1m ordinary shares;

(b) the nominal amount of each share was RM1; and

F (c) the amount paid on each share was RM1,

could not be contradicted, pursuant to ss 91 and 92 of the Evidence Act 1950, to show that the shares were allotted to the second defendant on a fully paid-up basis and relied on *Ah Mee v PP* [1967] 1 MLJ 220 in G support of this contention. In commenting on the defence as pleaded in paras 11 and 16 of the statement of defence that the RM1m was used to help the first defendant to increase its paid-up capital, he said that this was an admission that the RM1m was used to pay for the shares because a company can only increase its paid-up capital by the issue of shares.

In his submission, learned counsel for the defendants contended H that the plaintiff had no locus standi to maintain the action as only the first defendant may do so in accordance with s 67(6). He also said that there was no evidence to show that the RM1m was used to finance the purchase of the 1m shares. He contended in the alternative that the financing of the shares by the first defendant was done in good faith and relied on *Intraco* I *Ltd v Multi-Pak Singapore Pte Ltd* [1995] 1 SLR 313. He further submitted that if the court found that there was a violation of s 67(1), then the allotment of the shares ought to be validated under s 63 of the Act. He also said that in order to take the transaction out of the ambit of s 67, the

second defendant could be ordered to pay into the account of the first defendant, the sum of RM1m. He added that in any event the court should be less ready to render the allotment of shares illegal in the light of the judgment of the Federal Court in *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313. He then said that the plaintiff, being an advocate and solicitor himself, ought to be familiar with the provisions of s 67. It was the plaintiff who, whilst being in control of the first defendant, chaired all the relevant meetings for the allocation of the shares without being concerned about the violation of s 67. Thus, this action amounted to an abuse of process of the court.

Bearing in mind the submissions made and the agreed issues for determination, I shall consider the case under the following heads:

The plaintiff's reliance on ss 91 and 92 of the Evidence Act 1950

The sections read as follows:

> 91 When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
>
> 92 When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to s 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:
>
> Provided that:
>
> (a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;
>
> (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;
>
> (c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;
>
> (d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of any such incident would not be repugnant to or inconsistent with the express terms of the contract; and

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.

It was the contention of learned counsel for the plaintiff that the return of allotment of shares, being a statutory requirement, fell within the ambit of these sections and that the entries contained therein to show that 1m ordinary shares at RM1 each was allotted to the first defendant for which the amount was paid, could not be contradicted to show that the shares were allotted on a fully paid-up basis. This demands a deliberation of the scope of the two sections in order to determine their applicability to the document in question.

The best evidence about the contents of a document is the document itself and it is the production of the document that is required by s 91 in proof of its contents. In a sense, the rule enunciated by s 91 can be said to be an exclusive rule in as much as it excludes the admission of oral evidence for proving the contents of the document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act 1950. Section 92 applies to cases where the terms of contracts, grants or other dispositions of property have been proved by the production of the relevant documents themselves under s 91. In other words, it is after the document has been produced to prove its terms under s 91 that the provisions of s 92 come into operation to exclude evidence of any oral agreement or statement, for the purpose of contradicting, varying, adding to or subtracting from its terms. Sections 91 and 92, in effect, supplement each other. Section 91 would be frustrated without the aid of s 92 and s 92 would be inoperative without the aid of s 91. Since s 92 excludes the admission of oral evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of the document properly proved under s 91, it may be said that it makes the proof of the document conclusive of its contents. Like s 91, s 92 also can be said to be based on the best evidence rule (see *Bai Hira Devi v Official Assignee* AIR 1958 SC 448). Having dealt with the fundamental features of the two sections, I shall first consider the extent to which the contents of documents falling within the category of documents to which s 92 applies can be contradicted.

In my view, the statement of the law in *Ah Mee v PP* [1967] 1 MLJ 220, that a document falling within s 92 should remain uncontradicted must be understood in its proper perspective. What was stated in that judgment is only the general rule contained in s 92 which itself qualifies the rule by specifying exceptions to it as illustrated by the six provisos. In this regard, I refer to *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243 where Mohd Azmi FJ, in delivering the judgment of the Federal Court, said at p 247:

> Section 91 provides that the contents of a document must be proved by the document itself, and s 92 provides that *subject to certain provisos*, no evidence

> of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from its terms. (Emphasis added.)

In *Eushun Properties Sdn Bhd v MBf Finance Bhd* [1992] 2 MLJ 137, Mohd Yusoff SCJ, in speaking for the Supreme Court said at p 141 that s 92 '... does not absolutely bar the defendants from adducing evidence to vary the terms of formal agreement between the parties'. It is therefore incorrect to say that s 92 prohibits a document coming within its ambit from contradiction absolutely.

The operation of s 92 is exemplified by the Federal Court cases of *Ah Mee* itself and *Herchun Singh & Ors v PP* [1969] 2 MLJ 209, though, as I will attempt to show in a later part of this judgment, the question of whether the document involved in both these cases, that is to say, a police report, comes within the meaning of s 92 is another matter of monumental significance. In *Ah Mee*, the appellant had been convicted of rape. One of the grounds of appeal was the reception of inadmissible evidence in a material particular. The complainant had clearly given the number of the appellant's car as M7354 in her police report. In truth it was M6049 whereas M7354 belonged to a motorized grass-cutter which had become defunct since 1957. The trial judge, nevertheless, accepted her explanation of an honest mistake, that she was uncertain about it when the police requested her to give the number of the vehicle involved. On this issue Ong Hock Thye FJ (as he then was), in delivering the judgment of the court, said at p 223:

> Section 91 of the Evidence Ordinance applies equally to criminal trials, no less than to civil proceedings, and it categorically states that 'in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms ... of such matter except the document itself.' The report was information relating to the commission of an offence which 'shall be reduced to writing' pursuant to s 107 of the Criminal Procedure Code (FMS Cap 6), and s 92 of the Evidence Ordinance goes on to exclude all parole evidence seeking to contradict or vary what was set out in writing. Hence it should have remained uncontradicted, on the prosecution evidence, that whoever might have raped the complainant, he was certainly not this appellant, as owner of the vehicle M7354. Not to put too fine a point on it, one might have thought an inadvertent transposition of one or two digits quite possible and probable due to a genuine lapse of memory, but for the complainant to suggest that she could honestly have believed that '7354' bears any relation to '6049' passes all understanding.

In *Herchun Singh* it was argued that the police report in that case taken down by a police constable contained contradictions. Ong Hock Thye CJ (Malaya) accepted the finding of fact of the trial judge that the report which was taken down contained errors and omissions for which the constable alone was responsible. His Lordship distinguished *Herchun Singh* from *Ah Mee* on the basis that in the latter case the complainant clearly gave the number of her assailant's car as M6049, a contradiction for which she and no other person could have been held responsible. At first sight it

may appear that both the judgments are in conflict with each other. However, that is not so. It must be noted that in *Ah Mee*, the learned trial judge accepted the explanation of an honest mistake on the part of the complainant that she was uncertain about the number of the car when the police requested her to give the number of the vehicle involved but this explanation was rejected by the Federal Court on the ground that it '... passes all understanding'. As I said earlier, the explanation offered in *Herchun Singh* was accepted both by the High Court and Federal Court. Thus, ultimately the issue in the two cases was the credibility of the explanation and not its admissibility which are separate and distinct matters. This accords with the law enunciated in s 92 read with proviso (a) of the section.

The next matter for consideration is whether the applicability of s 92 of the Evidence Act 1950 to, inter alia, any matter required by law to be reduced to the form of a document is confined in its operation to bilateral and dispositive instruments only or also extends to unilateral and non-dispositive documents like the police report in *Ah Mee*. For this purpose the phrase '... and in all cases in which any matter is required by law to be reduced to the form of a document ...' in s 91 and the equivalent phrase '... or any matter required by law to be reduced to the form of a document ...' in s 92 are relevant. Both the phrases, read on their own, convey the same meaning. In interpreting the phrases as used in both the sections, I am guided by s 68 of the Interpretation Acts 1948 and 1967 which reads as follows:

> Every section of an Act of Parliament, Ordinance or Enactment shall have effect as a substantive enactment without introductory words.

In this regard, I also refer to *Statutory Interpretation* by Francis Bennion (2nd Ed) where the learned author says at p 490:

> It has been said by judges that the division of an Act into sections is arbitrary and ought not to be treated as furnishing a guide to its construction. This sweeping generalization might have contained some truth when it was uttered in the days of disorganized composition. With the precision drafting of today, the position is otherwise. Drafters take great care to design a section so that it deals with a single point; and the way the sections are organized and arranged is to be taken as a guide to legislative intention.

It is therefore manifestly patent that words and phrases appearing in a section must be interpreted in accordance with the context in which they are employed in the section. Thus the two phrases, though conveying the same meaning when read on their own, must be interpreted in the context in which they appear in both the sections.

My first observation is that the words 'when the terms ... have been proved according to s 91 ...' appearing in s 92 do not in any way imply that the category of documents referred to in both the sections is the same. The meaning of these words has been clearly explained by *Sarkar on Evidence* (14th Ed) at p 1201, with regard to the equivalent words in the Indian Evidence Act 1872 in this way:

> *Have Been Proved According to the Last Section* — Section 92 comes into operation when the written instruments referred to in the section, have been proved under s 91, that is, either by the production of the document itself, or by the production of secondary evidence of it, where secondary evidence is admissible under s 65. It is then that this section comes into play.

My next observation is that the phrase as it appears in s 91 is not qualified in its operation by other words in the section. Thus it means what it says. It applies to any matter which is required by law to be reduced to the form of a document. Consequently, there can be absolutely no dispute that it applies to both bilateral and unilateral and dispositive and non-dispositive documents. On the other hand s 92, having described the documents to which it applies including the documents encapsulated by the phrase in question, goes on to say, in its operative part, that '... no evidence of any oral agreement or statement shall be admitted *as between the parties to any such instrument or their representatives in interest* ...' . (Emphasis added.) Thus the phrase, as it appears in s 92, is explicitly qualified by the words emphasized. The words '... as between the parties to any such instrument or their representatives in interest ...' clearly and crisply connote in crystalline terms that the documents contemplated by s 92 are bilateral and dispositive in nature. On the determining effect of these words I can do no better than refer to *Woodroffe & Amir Ali's Law of Evidence* Vol 3 (15th Ed) where the learned authors say at p 71:

> The words 'contract, grant or other disposition of property' in this section refer to similar words in s 91, viz, 'when the terms of a contract or of a grant or of any other disposition of property have been reduced to the form of a document'; that is, cases where such reduction is the act of the parties. The words 'or any matter required by law to be reduced to the form of a document' in this section refer to similar words in s 91. But a matter so required to be reduced to the form of a document may be either a contract, grant or other disposition of property, such as a decree (*Venkatalingarna v Rao Muni Venkatodri* ILR 50 Mad 897) or it may be a fact, such as the evidence of a witness, the disposition regarding which is there, neither a contract nor a grant or other disposition of property. The present section, in this respect, unlike the last, deals only with those matters, which the law requires 'to be reduced to the form of a document' and which are contracts, grants or other dispositions of property. This is indicated by the words 'as between the parties to any such instrument or their representatives-in-interest,' which are only applicable in the case of documents which are of a dispositive character. The subject matters of this section, therefore, are contracts, grants and other dispositions of property, whether embodied in documents by consent of parties or by requirements of law, and therefore the words 'no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument' have reference both to the words 'contract, grant or other disposition of property', in the beginning of the section and to the words 'any matter required by law etc', which follow them (*Debendra Narain v Somendra Mohan* AIR 1914 Cal 697; *Ananda Priya v Bijay Krishna* AIR 1926 Cal 643; *Gajanand v Hari Bux* AIR 1943 Cal 634; *Ganga Dihal Rai v Ram Oudly* AIR 1929 All 79; *Adappa Papamma v Darbha Vankayya* AIR 1935 Mad 860; *Kalyanji Dhana v Dharamsi & Co*

A AIR 1935 Bom 303; *Udham Singh v Atma Singh* AIR 1941 Lah 149; *Satyabadi Sahu v Mani Sahu* AIR 1936 Pat 619).

The same view is expressed in *Sarkar on Evidence* (14th Ed) at pp 1195–1196 in the following terms:

> B The words 'contract, grant or or other disposition of property' as well as the words 'any matter required by law to be reduced to the form of a document' in s 92 are also to be found in s 91. The words 'contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document' in s 91 refer to transactions recorded in writing by agreement of the parties. The words 'any matter required by law to be reduced to the form of a document' in s 91 explain themselves. Both phrases apply to C unilateral as well as bilateral documents as s 91 is not restricted to the parties to an instrument. Further, s 91 applies to both dispositive and non-dispositive documents.
>
> Taken apart from both the sections and their contexts, the two expressions have the same meaning. But the words 'as between the parties to any such instruments or their representatives in interest', which appear in D s 92 only, indicate that their meaning is not the same in both sections and the documents referred to in both sections are not identical. It should first be noted that the absence of the words 'as between the parties, etc' in s 91 shows that the section applies to both unilateral documents (eg wills, powers of attorney, deposition of witness, etc) and bilateral documents (eg contract, grants, etc, between two or more parties). The rule is s 91 E therefore applies to strangers, ie persons who are not parties to the document. The words 'as between parties, etc' and the reference to 'separate oral agreement' in s 92 seem to point out that the section does not apply to unilateral documents ... .
>
> The words 'as between the parties ... interest' are to be read along with the words 'contract, grant or other disposition of property' and also along F with the words 'or any other matter ... of a document'. The words as 'between the parties to any such instrument' further point out that s 92 applies only to dispositive documents, ie documents by which rights are disposed of, eg 'contract, grant or other disposition of property.' These words naturally apply to dispositive documents between contracting parties or parties to whom any property is transferred. This view has been accepted G in a case where it has been held that this section refers to only what are known as 'dispositive documents' and the words 'any other matter required by law to be reduced to the form of a document' must be read in that sense. A decree does not therefore come within the purview of s 92 (*Anandapriya v Bijay* 91 1C–105; A 1926(643); see also *Debendra v Saurendra* 241C 391; *Adape v Darbha* 58 MFB).

H

Sections 91 and 92 were exhaustively dealt with by the Indian Supreme Court in *Bai Hira Devi v Official Assignee, Bombay* AIR 1958 SC 448 and Gajendrajadkar J, in writing for the court, said at p 450:

> I The two sections, however, differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas s 92 applies to documents which can be described as dispositive. Section 91 applies to documents which are both bilateral and unilateral, unlike s 92, the application of which is confined only to bilateral documents. Section 91 lays down the rule of universal application and is not confined to

the executant or executants of the documents. Section 92, on the other hand, applies only between the parties to the instrument or their representatives in interest. A

As a matter of fact, the issue that I am addressing now has already been decided by our Federal Court. In *PP v Datuk Haji Harun bin Idris & Ors* [1977] 1 MLJ 180 Abdoolcader J (as he then was), in construing s 92 to be applicable to only bilateral and dispositive documents, said at p 183: B

> I should also at this stage refer to the submission of counsel for the second accused that no evidence which would in any way contradict, vary, add to or subtract from the minutes of the board meeting of the bank is admissible by virtue of the provisions of ss 91 and 92 of the Evidence Act 1950, notwithstanding profuse examination and cross-examination on the minutes throughout these proceedings. This submission on a point of law should perhaps be considered and disposed of before I come to deal with the evidence and is, as I understand it, premised on the provisions of by-law 50, which prescribes that all matters deliberated or decided upon at a board and general meeting shall be recorded in a minute book and signed by the secretary and the chairman on confirmation of the minutes. Counsel for the second accused argues that this is therefore a matter required by law to be reduced to the form of a document and accordingly comes within the provisions of ss 91 and 92 of the Evidence Act. I cannot accept that contention for two reasons. Firstly, it is clear from the terms of by-law 50 that what should be recorded in the minute book are only matters deliberated or decided upon, and the minutes cannot therefore be fully exhaustive of everything that transpires at such meetings. *And secondly, in the context of the wording in s 92 of the Evidence Act, the clause 'any matter required by law to be reduced to the form of a document' would appear to refer to bilateral instruments and dispositive documents only, such as contracts, grants or other disposition of property which the law requires to be reduced to writing, and not to everything and all matters which the law requires to be reduced into a document, as, for instance, the depositions of witnesses which, though required by law to be reduced to the form of a document, would not come within this section and oral evidence is therefore admissible to contradict such deposition.* (Emphasis added.)

C D E F

The Federal Court agreed with the views expressed by Abdoolcader J (as he then was) (see [1978] 1 MLJ 240 at p 247) which therefore became the views of the Federal Court as well. In this regard, I also refer to *D-G of Inland Revenue v Ee Sim Sai* [1977] 2 MLJ 32 where Ibrahim J (as he then was), in considering whether s 92 of the Evidence Act 1950 is applicable to Form 14A as prescribed by the National Land Code 1965, said at p 33: G

> After analysing and comparing the two sections, I am of the view that as Form 14A is dispositive in character, s 92 would operate in this case. *Sarkar on Evidence* (12th Ed) at p 774, in distinguishing the two sections, states, among other things, that s 91 refers to all documents whether dispositive or non-dispositive whereas s 92 deals with dispositive documents only and that the two sections complement and supplement one another. H

Thus the conclusion of Abdoolcader J in *PP v Datuk Haji Harun bin Idris & Ors* [1977] 1 MLJ 180 that '... in the context of the wording of s 92 of the Evidence Act, the clause "any matter required by law to be reduced to the form of a document" would appear to refer to bilateral instruments I

and dispositive documents only ...', which was accepted by the Federal Court, cannot be assailed. It therefore follows that s 92 does not apply to all the documents that come within s 91. This reasoning, however, is in clear conflict with *Ah Mee*, another Federal Court judgment, where the document considered in the context of s 92 was a police report — a document which cannot fall within the ambit of s 92 as it is unilateral and non-dispositive. However, it must be observed that in *Ah Mee*, the Federal Court, after having meticulously explained the reasons for holding that a police report came within s 91 then proceeded to assume automatically that it is caught by the prohibition contained in s 92 (see also *Inspector General of Police & Anor v Alan Noor bin Kamat* [1988] 1 MLJ 260). It was said as long ago as 1661 that 'precedents sub silentio and without argument are of no moment' (see *R v Warner* (1661) 1 Keb 66). In this regard *Precedents in English Law* by Cross and Harris (4th Ed) states at pp 158–159:

> It seems always to have been accepted that if a proposition of law, though implicit in a decision, was never expressly stated either in argument or in the judgment, the decision constitutes no binding authority for it, whether on the ground that there is here an exception to stare decisis, or for the reason that such proposition is not truly part of the ratio. The last 15 years have seen a tendency to regard decisions as not binding at any level of the judicial hierarchy as to propositions expressly affirmed by them if, owing to the absence of any argument on the point, it can be inferred that the deciding court merely assumed their correctness. In this light, decisions without argument must be viewed as a general exception to stare decisis.

In *Baker v R* [1975] AC 774, the Privy Council held that although inferior courts were bound by decisions of the Board even if they were per incuriam, they were not bound by propositions of law incorporated into the ratio decidendi which had merely been assumed to be correct without argument. The sequel is that, and with the utmost respect, the decision in *Ah Mee* on the applicability of s 92 of the Evidence Act 1950 to unilateral documents loses its efficacy as a binding precedent. In any event where the rationes decidendi of two decisions of a higher court of equal jurisdiction conflict with one another and the later decision does not purport to overrule the earlier, an inferior court may choose which ratio decidendi it will follow and in doing so it may act on its own opinion as to which is the more convincing (see *Baker v R* [1975] AC 774). I am therefore compelled to conclude that the proper interpretation to be accorded to s 92 is the ratiocination of Abdoolcader J (as he then was) in *PP v Datuk Haji Harun bin Idris & Ors* [1977] 1 MLJ 180, which was accepted by the Federal Court, as it is more convincing. The corollary is that the prohibition contained in s 92 of the Evidence Act 1950 applies only to bilateral and dispositive documents. The section has no application to unilateral and non-dispositive documents such as police reports and in consequence thereof, oral evidence is admissible to contradict them. I interpolate to add, and again with the utmost respect, that the treatment of certain unilateral documents as having been hit by s 92 in cases such as *Pavone v PP* [1986] 1 MLJ 72, *PP v Lee Eng Kooi* [1993] 2 MLJ 322,

PP v Krishnan all Letchumanan & Anor [1995] 2 MLJ 690 and *PP v Sulaiman bin Mohamed Noor* [1996] 1 MLJ 196 was done so as a result of no argument having been advanced to the court for deliberation in the line that I have discussed.

It is therefore my view that the return of allotment of shares, being a unilateral document, can be contradicted if the facts warrant it.

Whether financial assistance was provided by the first defendant within the meaning of s 67 of the Companies Act 1965

Section 67 reads as follows:

(1) Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase, deal in or lend money on its own shares.

(2) Nothing in sub-s(1) shall prohibit:

(a) where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business;

(b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of or subscription for fully-paid shares in the company or its holding company, being a purchase or subscription by trustees of or for shares to be held by or for the benefit of employees of the company, or a subsidiary of the company including any director holding a salaried employment or office in the company or a subsidiary of the company; or

(c) the giving of financial assistance by a company to persons, other than directors, bona fide in the employment of the company or of a subsidiary of the company with a view to enabling those persons to purchase fully-paid shares in the company or its holding company to be held by themselves by way of beneficial ownership.

(3) If there is any contravention of this section, the company is, notwithstanding s 369, not guilty of an offence but each officer who is in default shall be guilty of an offence against this Act.

Penalty: Imprisonment for five years or RM100,000.

(4) Where a person is convicted of an offence under sub-s(3) and the court, by which he is convicted is satisfied that the company or another person has suffered loss or damage as a result of the contravention that constituted the offence, the court may, in addition to imposing a penalty under that subsection, order the convicted person to pay compensation to the company or the person, as the case may be, of such amount as the court specifies, and any such order may be enforced as if it were a judgment of the court.

A (5) The power of a court under s 354 to relieve a person to whom that section applies, wholly or partly and on such terms as the court thinks fit, from a liability referred to in that section, extends to relieving a person against whom an order may be made under sub-s(4) of this section from the liability to have such an order made against him.

B (6) Nothing in this section shall operate to prevent the company (or any person) from recovering the amount of any loan made in contravention of this section or any amount for which it becomes liable (either) on account of any financial assistance given (or under any guarantee entered into or in respect of any security provided) in contravention of this section.

C (The words in brackets in s 67(6) are not relevant for the purposes of this case as they were introduced by Act A836 after the cause of action arose in this case.)

Section 67(1) of the Act reveals that a company is prohibited from:

D (a) giving financial assistance for the acquisition of its shares or shares in its holding company;

(b) purchasing or dealing in its own shares; and

(c) lending money on the security of its own shares.

E The object of the section is to ensure that the assets of a company are preserved and not returned to the members directly or indirectly. In this respect, Jessel MR said in *Re Exchange Banking Co (Flitcroft's Case)* (1882) 21 Ch D 519 at pp 533–534:

> F The creditor has no debtor but that impalpable thing, the corporation, which has no property except the assets of the business. The creditor, therefore, I may say, gives credit to that capital, gives credit to the company on the faith of the representation that the capital shall be applied only for the purposes of the business, and he has therefore a right to say that the corporation shall keep its capital and not return it to the shareholders.

G Thus if there is a contravention of s 67(1), the company does not commit an offence but each officer of the company who is in default is guilty of an offence pursuant to s 67(3). Section 67(6) provides remedies for the company where there is a contravention of s 67(1). The object of this provision is to preserve the rights of the company in the event of any contravention of the section.

H Of the prohibitions contained in s 67(1), what is relevant for the purposes of the case at bar is the giving of financial assistance by a company in respect of a subscription made for its shares. 'Subscription' for shares is the process by which a person becomes a shareholder of a company through the allotment and issue of shares to him while a 'purchase' occurs when a person obtains a transfer of shares from a shareholder for a consideration. Section 67(1) states that financial assistance for an acquisition I of shares may be provided directly or indirectly by means of a loan guarantee or the provision of security 'or otherwise'. The words 'or otherwise' are very wide and mean 'in any other way'. In this regard, I refer to *EH Dey Pty Ltd (In liquidation) v Dey* [1966] VR 464 where

McInerney J in referring to the words in the Australian equivalent of s 67(1) said at p 469: A

> The words 'or otherwise' are, however, very wide. The width of apparently general words is sometimes cut down by the ejusdem generis rule. In the present case, however, the words 'loan', 'guarantee' and 'the provision of security' do not constitute a genus and there is, therefore, no question of cutting down the width of the meaning of the words 'or otherwise' by reference to the ejusdem generis rule. I construe the words as meaning 'in any other way'. B

The prohibition, therefore, is on the company giving, in any way, any financial assistance for the purpose of or in connection with a purchase of or subscription made or to be made by any person for any shares in the company. On the question of the person to whom the financial assistance should have been given, McInerney J said in the *Dey* decision at p 470: C

> In my view, the prohibition is not confined to financial assistance to the purchaser: it is directed to financial assistance to whomsoever given, provided that it be for the purchase of ... shares or in connection with a purchase of shares. D

The essence of the question whether a company has contravened s 67(1) is whether it has diminished its financial resources, including future resources, in connection with the sale and purchase of its shares and the matter is not to be determined by considering only what is done by the parties to the transaction. The words 'financial assistance' are words of a commercial rather than a conveyancing kind and the form of the obligation or transaction will not be conclusive (see *Burton v Palmer* [1980] 2 NSWLR 878). Accordingly if the transaction is a bona fide commercial transaction entered into in good faith, the fact that the proceeds of the transaction are used to assist in acquiring the company's shares will not make the transaction illegal (see *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313; *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1995] 1 SLR 313; *Belmont Finance Corp v Williams Furniture Ltd & Ors (No 2)* [1980] 1 All ER 393 and *Charterhouse Investment Trust Ltd & Ors v Tempest Diesels Ltd* [1989] BCLC 1). Thus the giving of financial assistance means making a provision in money or money's worth to which a shareholder was not already entitled in his capacity as a shareholder (see *Rossfield Group of Operations Pty Ltd v Austral Group Ltd* [1981] Qd R 279). Even where a company provides assistance by way of a gift, it amounts to financial assistance (see *Re VGM Holdings Ltd* [1942] 1 All ER 224). E F G H

It is the contention of learned counsel for the defendants that the plaintiff has led no evidence to show that the RM1m was used to finance the purchase of the 1m shares. In my view cll 2.12 and 4.2(a) of the agreement entered into between the first and second defendants, which I have reproduced in an earlier part of this judgment, clearly provide that out of the sums becoming payable under that agreement, RM1m shall be paid to the first defendant in respect of the shares to be subscribed by the second defendant. Exhibit P4 which was admitted by consent shows that out of the RM3.3m received as part payment for the purchase of the land from the second defendant, RM1m was in respect of the shares allotted to I

A the second defendant. In his evidence on this exhibit, the plaintiff said that the RM1m was to be treated as payment for the allotment of shares to the second defendant. I must point out that this sum forms part of the purchase price which the second defendant was obliged to pay the first defendant in respect of the purchase of the land from the latter. Thus the transaction amounted to no more than the second defendant being allotted B shares in the first defendant at no cost arising from the sale transaction between them. The transaction was used as a vehicle to discharge the obligation of the second defendant to the first defendant with regard to the payment arising from the allotment of the shares. The resultant matter for determination is whether this amounts to 'financial assistance' within the C meaning of s 67(1) of the Act in the light of the law that I have adverted to. In *EH Dey Pty Ltd (In liquidation) v Dey* [1966] VR 464, it was held that the company had given financial assistance in connection with the purchase of shares by agreeing to treat the defendant as having paid a certain sum which he at that time owed the company. That precisely is the position in the case before me. It is therefore my view that the first D defendant assisted the second defendant to acquire the 1m shares financially as the transaction that they entered into resulted in the second defendant obtaining the shares without any payment by reason of RM1m accruing from the sale of the land being treated as payment for the shares. This has resulted in the first defendant's assets being diminished in value. Thus the E statement in the resolution of the first defendant that the shares had been fully paid and the statement in the return of allotment of shares that the value of the shares had been paid, in actual fact, refer to the treatment of the sum due as having been paid.

Be that as it may, the fact that the first defendant provided financial F assistance to the second defendant to acquire the shares will not amount to financial assistance within the meaning of s 67(1) of the Act if the transaction was a bona fide commercial transaction entered into in good faith. The available evidence shows that the allotment of the 1m shares was in line with the first defendant's programme for expansion. However, that does not mean that the allotment of the shares to the second defendant G at no cost is a bona fide commercial transaction. As a matter of fact, the subscription of shares in the first defendant by the second defendant was not a commercial transaction as far as the first defendant was concerned. It was not a transaction whereby the first defendant acquired anything which it genuinely needed for its own purpose. On the other hand, it was a transaction which facilitated the second defendant's acquisition of control H of the first defendant for its own purpose. It was certainly not a transaction in the ordinary course of the first defendant's business. As Buckley LJ said in *Belmont Finance Corp v Williams Furniture Ltd & Ors (No 2)* [1980] 1 All ER 393 in somewhat similar circumstances, at p 403:

> I ... It was an exceptional and artificial transaction and not in any sense an ordinary commercial transaction entered into for its own sake in the commercial interests of Belmont (in this case the first defendant). It was part of a comparatively complex scheme for enabling Mr Grosscurth and his associates to acquire Belmont (in this case the first defendant) at no cash

> cost to themselves, the purchase price being found not from their own funds or by realization of any asset of theirs ... but out of Belmont's (in this case the first defendant's) own resources.

I therefore hold that the first defendant has provided financial assistance to the second defendant for the subscription of the 1m shares within the meaning of s 67(1) of the Act. The ensuing matter for deliberation is the legal effect of an agreement made in contravention of s 67(1).

The validity of the transaction

The answer to this issue brings into sharp focus s 24 of the Contracts Act 1950 which, omitting parts not relevant, reads as follows:

> The consideration or object of an agreement is lawful unless:
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> ...
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Section 24 of the Contracts Act 1950 states signally that if an agreement is forbidden by law or prohibited by law or is of such a nature that it would defeat the law, that agreement is unlawful and void. I shall now consider whether an agreement entered into in contravention of s 67(1) of the Act attracts s 24 of the Contracts Act 1950 to render the agreement void in the light of the penalties provided in s 67(3) and the unambiguous saving provision contained in s 67(6) and having regard to the context and purpose of s 67(1). In *Phoenix General Insurance Co of Greece SA v Adas* [1987] 2 All ER 152, the Court of Appeal was concerned with the question of illegality of certain insurance and reinsurance contracts which had been forbidden by statute. In dealing with this issue, Kerr LJ said this at p 171:

> The next point is then that it is settled law that any contract which is prohibited by statute, either expressly or by implication, is illegal and void. The leading old authority is the judgment of the Court of Exchequer delivered by Parke B in *Cope v Rowlands* (1836) 2 M & W 149; 150 ER 707. The relevant statutory provision prohibited any unauthorized person from 'acting as a broker' within the City of London. It was held that an otherwise valid brokerage contract made by an unauthorized person was illegal and void. Since the statute in that case did not contain any reference to contracts, the situation under the 1974 Act is a fortiori. Parke B said (2 M & W 149 at p 157; 150 ER 707 at p 710):
>
> > 'It is perfectly settled that, where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition ... . And

A it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so, has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract?'

B Later on in his judgment, at p 173 Kerr LJ referred to the judgment of the High Court of Australia in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 where Gibbs ACJ said at p 413:

It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for C complete accuracy it needs qualification, because it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable. However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable, and in most cases it is sufficient to say, as has been said in many cases of authority, that the test is D whether the contract is prohibited by the statute. Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.

E Hashim Yeop A Sani CJ (Malaya) referred to these passages in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 and said at p 361:

Thus, in our view, it may be stated as a general principle that a contract, the making of which is prohibited by statute expressly or by implication, shall F be void and unenforceable unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself.

With regard to the effect of s 67(6) of the Act, his Lordship said in the same case at p 362:

G

Therefore, the scope of s 67(6) of the Act is confined only to the protection of the company and no one else.

The words 'recovering the amount of any loan made in contravention of this section' in s 67(6) can only mean any loan made by the company itself. The intention of the legislature is made clear in the explanatory H statement to the Bill when it was presented to Parliament. The notes on s 67 state that sub-cl(4) (now sub-cl(6)) 'is designed to preserve the rights of the company to recover loans made in contravention of the provisions of this clause'. The company there includes the subsidiaries. The explanatory notes went on to say that it was wrong to punish the company and the shareholders because of the default of the company's directors.

I His Lordship went on to say that the transactions in that case were void under s 24 after having refused an application to sever the securities and guarantees that were tied up to the loan transactions. In commenting on the *Chung Khiaw Bank* decision, Lai Ching Sum in an article entitled

Section 67 of the Companies Act: A Hornet's Nest? [1992] 2 MLJ xi said at pp xiv–xv:

> In *Wai Hin Tin Mining*, Chang Min Tat J (as he then was) held that the company could not recover a loan, the purpose of which was to assist the defendant to purchase shares in the company. However, the learned judge recognized that the civil consequences of a prohibited transaction would be different had there been a saving provision. The case was cited by Hashim Yeop A Sani CJ (Malaya) in *Chung Khiaw Bank* who noted that sub-s(6) did not exist under the former provisions. Whilst his Lordship did specifically hold that a company would be able to recover loans made in contravention of s 67 because of the subsection, his Lordship gave the subsection only a cursory consideration. This is despite the fact that his Lordship did recognize the possibility of the statute itself saving a transaction which is prohibited by the statute. ... If the company could enforce the prohibited transaction, it does not have to prove any breach of trust or breach of directors' duties to recover a loan which is prohibited by s 67. If the purpose of sub-s(6), as stated in *Chung Khiaw Bank*, is to protect the company, it is submitted that the company should be able to rely on the prohibited transaction to recover the loan. Furthermore, the company could also rely on s 66 of the Contracts Act 1950 to seek an order for restitution of the amount loaned.

In my opinion, the Supreme Court would have allowed the claim in that case if the claim had been only for the loan. It must be noted that s 67(6), as it then stood, protected only loans and nothing else and the claim in that case went beyond the ambit of the section.

In *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313, the Federal Court was concerned with the question of whether there are any civil consequences which flow from a breach of s 133 of the Companies Act 1965 upon the validity of two loan and charge transactions registered under the National Land Code 1965. Section 133 reads as follows:

> (1) A company (other than an exempt private company) shall not make a loan to a director of the company or of a company which by virtue of s 6 is deemed to be related to that company, or enter into any guarantee or provide any security in connection with a loan made to such a director by any other person, but nothing in this section shall apply:
>
> (a) subject to sub-s(2), to anything done to provide such a director with funds to meet expenditure incurred or to be incurred by him for the purposes of the company or for the purpose of enabling him properly to perform his duties as an officer of the company;
>
> (b) to anything done to provide such a director who is engaged in the full-time employment of the company or its holding company, as the case may be, with funds to meet expenditure incurred or to be incurred by him in purchasing or otherwise acquiring a home; or
>
> (c) to any loan made to such a director who is engaged in the full-time employment of the company or its holding company, as the case may be, where the company has at a general meeting approved of a scheme for the making of loans to employees of the company and the loan is in accordance with that scheme.
>
> ...

A (4) Where a company contravenes this section any director who authorizes the making of any loan, the entering into of any guarantee or the providing of any security contrary to this section shall be guilty of an offence against this Act.

Penalty: RM10,000.

B (5) Nothing in this section shall operate to prevent the company from recovering the amount of any loan or amount for which it becomes liable under any guarantee entered into or in respect of any security given contrary to this section.

Edgar Joseph Jr FCJ, in writing for the court in the *Feyen* decision in a style deserving of the highest judicial accolades for making intrepid inroads into this area of the law, said that it is obvious that s 133 does not in terms say that a guarantee entered into or any security given in contravention thereof is to be void, although this would result in the imposition of criminal liability on the official of the company concerned, and on the company itself, by virtue of the general penalty provisions contained in s 369(1)(a) and (2) of the Act. His Lordship then added at p 321:

> Nevertheless, the general rule is that a contract, the making of which is prohibited by statute expressly or by implication, and which stipulates for penalties for those entering into it, shall be void and unenforceable, unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself (see *Holman v Johnson* (1775) 98 ER 1120 at p 1121; *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356). However, the general rule is subject to exceptions and, at the end of the day, it is a question of construction of the particular statute.

His Lordship then cited the passage from *Yango* which I have reproduced in an earlier part of the judgment and referred to *Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd* [1994] 1 MLJ 369, where this passage was quoted with approval. His Lordship also referred to various authorities to show that courts are now less ready to find a contract illegal or unenforceable simply by reason of a statutory provision, including *Yango* where Mason J (as he then was) said at p 429:

> There is much to be said for the view that once a statutory penalty has been provided for an offence, the rule of the common law in determining the legal consequences of commission of the offence is thereby diminished (see my judgment in *Jackson v Harrison* (1978) 138 CLR 438 at p 452. See also the suggestions that the principle cannot apply to all statutory offences: *Beresford v Royal Insurance Co Ltd* in the Court of Appeal [1937] 2 KB 197 at p 220, per Lord Wright; *Marles v Philip Trant & Sons Ltd* [1954] 1 QB 29 at p 37, per Denning LJ) and that it would be a curious thing if the offender is to be punished twice, civilly as well as criminally (*St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267 at p 292, per Devlin J). The main considerations from which the principle ex turpi causa arose can be seen in the reluctance of the courts to be instrumental in offering an inducement to crime or removing a restraint to crime (*Beresford's case* [1938] AC 586 at pp 586 and 599; *Amicable Society v Bolland (Fauntleroy's case)* (1830) 4 Bligh (NS) 194 at p 211; 5 ER 70 at p 76).

> However, in the present case, Parliament has provided a penalty which is a measure of the deterrent which it intends to operate in respect of non-compliance with s 8. In this case it is not for the court to hold that further consequences should flow, consequences which in financial terms could well far exceed the prescribed penalty and could even conceivably lead the plaintiff to insolvency with resultant loss to innocent lenders or investors.

His Lordship then referred to s 67 of the Act and the differences between that section and the equivalent English and Australian provisions which do not have anything similar to s 67(6). Reference was also made to *Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* [1990] 2 MLJ 365, where a third party charge, created in favour of a lender as security for an illegal loan granted by the lender to a director of the chargor company, was held by NH Chan J (as he then was) to be void and unenforceable for breach of the prohibition imposed by s 133(1), relying heavily on an array of English and Australian decisions. His Lordship then referred to *Co-operative Central Bank Bhd v Sykt Bukit Tinggi & Ors* [1991] 1 CLJ 590 where Mohd Dzaiddin J (as he then was) declined to follow *Che Wan* for the reason, inter alia, that NH Chan J (as he then was) had overlooked the effect of s 133(5). Edgar Joseph Jr FCJ then added at p 329:

> In our view, to admit the defence of illegality to a commercial transaction of the present sort would defeat a purposive interpretation of sub-ss(1) and (5) of s 133 of the Act, which is designed for the protection of the company, its shareholders and creditors from unlawful dissipation of its resources.
>
> We would go further and say that to admit the defence of illegality to defeat the chargee society's application to enforce the charges by way of an order for sale, would, in the words of Mason J (as he then was) in *Yango Pastoral* (at p 428), provide 'a windfall gain' to the chargor company and others in a similar position. In consequence, such a result would impose substantial hardship upon the chargee society for, in the words of Gibbs CJ in *Yango Pastoral* (at p 415, para 1):
>
> > '... if a body corporate were unable to recover money that it has lent, it would be disabled from performing its own obligations, including those owed to its depositors. In those circumstances 'the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute' (*Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374 at p 390; *Dalgaty and New Zealand Loan Ltd v VC Imeson Pty Ltd* (1963) 63 SR (NSW) 998 at p 1004).'

His Lordship concluded his enlightening judgment at p 330 in this way:

> Fortunately, in our view, sub-s (5) of s 133 enables us to hold that a breach of sub-s(1) of s 133 does not have the result contended for by counsel for the chargor company, for the reasons hereinbefore mentioned. The case of *Co-operative Central Bank Bhd v Sykt Bukit Tinggi & Ors* was, therefore, rightly decided by Mohd Dzaiddin J (now FCJ) in favour of the chargee, on the ground of the effect of sub-s(5) of the Act. It follows, therefore, that the case of *Che Wan* was wrongly decided.
>
> To summarize, our conclusion is that accepting that the charge transaction did breach s 133(1) of the Act, no civil consequences flowed therefrom, that is to say, no voidness or unenforceability attached to the

A loan or the charge transactions, regard being had to the context and purpose of s 133(1), and especially the principle underlying s 133(5), as explained above, which regrettably the learned judge failed to take into account or to give proper weight to, with the result that his judgment cannot stand.

I now refer to s 111 of Ordinance No 155 (Companies) of the Straits B Settlements which is probably the distant predecessor of ss 67 and 133 of the Act. It reads as follows:

(1) No loan shall be made by any banking or insurance company or by any deposit, provident or benefit society to any director or officer of such company or society or to any firm of which any director or officer of such company or society is a partner, except upon securities in which C a trustee may invest under the powers of Ordinance No 144 (Trustees) and the value of which exceeds the amount lent by 30%.

(2) A list containing the amounts lent every month under sub-s(1) and the names of the director or officers to whom such loans have been made together with the amounts previously lent which have not been repaid shall be prepared, and a copy thereof shall on or before the first D Monday in every succeeding month be sent to the registrar.

(3) No such company as aforesaid shall lend any part of its funds upon the security of its shares.

(4) If any loan is made in contravention of this section, any director or manager of the company or society shall be liable to a fine not exceeding E RM1,000 and shall also be liable for the payment of any portion of the amount lent which remains unpaid after deducting the amount realized on the securities.

(5) If default is made in complying with sub-s(2) any director or manager of the company or society shall be liable to a fine not exceeding RM50 for every day during which the default continues.

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Subsection (3) prohibits a company from lending any part of its funds upon the security of its shares. Subsection (4) provides for criminal sanctions and civil liability for a breach of the section. In *Batu Pahat Bank Ltd v The Official Assignee of the Property of Tan Keng Tin (a bankrupt)* [1933] MLJ 237, the question that arose for determination was whether a security G given in breach of s 111(3) was invalidated. The question was answered in the negative by Lord Russell of Killowen who, in delivering the advice of the Privy Council in that case, said at pp 238–239:

> The question then arises whether s 111(3) of the Companies Ordinance operates to invalidate the security or whether it merely prohibits the making H of a loan on security under pain of incurring the specified penalties and liabilities. The answer to this question, which is the crucial question in the case, depends upon the true construction of the language used in the section, and this, in their Lordships' opinion, is, by sub-s (4), made reasonably clear. Subsection 4 deals in terms with the case of 'any loan ... made in contravention of this section.' It was argued that this sub-section only refers I to a loan made in contravention of sub-s (1); and that the words 'the securities' refer only to the securities for a loan within sub-s (1). Their Lordships cannot so hold, without giving to the words used, a meaning which they simply do not bear. Subsection (5) shows that the legislative power when it desired to do so, did in terms refer to the infringement of a

particular subsection. Their Lordships can do no other than say that sub-s (4) means what it says, and that it deals with any loan made in contravention of the section, including, therefore, a loan by a banking company of part of its funds upon the security of its shares. If that event happens, sub-s (4) specifies the consequences, and they include a personal liability on directors and managers for 'the payment of any portion of the amount lent which remains unpaid after deducting the amount realized on the securities.' *This is a recognition by the sub-section of two things, viz: (i) the continuance of the security on which the loan was made; and (ii) the discharge of the debt pro tanto by the proceeds of its realization.* In the face of this it seems to their Lordships impossible to say that s 111(3) operates to invalidate a lien which would, apart from that sub-section, be an effective lien.

For these reasons their Lordships are of the opinion that the appeal should succeed, that the orders of Terrell J and of the Court of Appeal should be set aside, and an order made declaring that the bank has a valid lien on the 110 fully paid shares for the principal and interest due to them in respect of the loan. (Emphasis added.)

The transparent ratio to be discerned from the cases that I have anatomized is that a contract which is prohibited by statute does not become void and unenforceable if the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself. Section 24 of the Contracts Act 1950 cannot apply to such a contract for the obvious reason that the statute itself has saved the contract which was otherwise forbidden. As Gibbs ACJ observed in the passage from the *Yango* decision, which I have reproduced in an earlier part of the judgment, it is only in a rare situation in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable. Section 67 of the Act is one of the instances of such rare exercise of legislative power. I therefore hold that as s 67(3) prescribes penalties for a breach of s 67(1) and s 67(6) provides remedies for the breach and, furthermore, having regard to the context and purpose of s 67(1), any transaction entered into in breach of the section is valid and enforceable. In the circumstances the agreement in this case does not become void and unenforceable. The corollary is that the transaction entered into by the parties is valid and, in consequence thereof, the first defendant may enforce payment arising from the allotment of the shares for which it gave financial assistance. I pause to refer to the reliance of the plaintiff on *Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors* [1981] 2 MLJ 114 and *Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Co* [1990] 3 MLJ 485 in support of his submission. My short answer to the two judgments is that in the case of the former, no reference was made to s 67(6) while in the case of the latter, only a brief reference was made to s 67(6), unlike the principle of law lucidly enunciated in *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313 which, in the circumstances, is more convincing. In the light of my conclusion, it is unnecessary for me to consider whether the allotment of the shares can be validated under s 63 of the Act. Neither is it necessary for me to consider whether, on the facts of this case, the court should come to the aid of the plaintiff based on authorities such as *Sajan*

Singh v Sardara Ali [1960] MLJ 52, *Tinsley v Milligan* [1993] 3 All ER 65, *Wai Hin Tin Mining Co Ltd v Lee Chow Beng* [1968] 2 MLJ 251 and *Lee Chua v Mustafa bin Osman* [1996] 1 AMR 680 which was affirmed by the Court of Appeal (see [1996] 2 AMR 2566).

Notwithstanding what I have said thus far, I must point out that the declarations sought by the plaintiff are to render only the allotment of shares to the second defendant void. My immediate response is that s 67(1) only prohibits the giving of financial assistance for the acquisition of shares and not the acquisition of the shares itself which is perfectly lawful unless there is evidence, of which there is none, that it was illegally allotted by, for example, not following the proper procedure. The allotment of shares to the second defendant is therefore not hit by s 67(1) and is thereby not invalidated in any way (see *Spink (Bournemouth) Ltd v Spink* [1936] 1 All ER 597 and *EH Dey Pty Ltd (In liquidation) v Dey* [1966] VR 464) without the need to invoke s 67(6). This, however, is subject to an important qualification. As the allotment of shares in this case is connected with the financial assistance provided by the first defendant, the activation of s 67(1) depends on whether both the transactions can be severed. If they can, then the transaction relating to the acquisition of shares does not come within s 67(1) (see *Carney v Herbert* [1985] AC 301). It is not necessary for me to decide whether the two transactions can be severed for two reasons: firstly, it was not argued before me; and secondly, it is not relevant for obvious reasons as the result would be the same whether the transactions are severable or not. If they are severable, the allotment of shares is valid as it is not prohibited by s 67(1). If they are not severable the composite transaction will be governed by s 67(6) and will still be valid.

The locus standi of the plaintiff

The language of s 67(6) of the Act, as it then stood, makes it clear that only the company has the locus standi to institute an action in respect of a transaction entered into in contravention of s 67(1). It was perhaps to remedy this anomalous situation that the words '... or any person ...' were added after the word '... company ...' in s 67(6) by Act A836. As this amendment was not made with retrospective effect, the plaintiff is still bound by s 67(6) as it stood prior to the amendment with the result that he is precluded from instituting a suit under s 67. In this respect, the amendment of the capacity of the plaintiff by the addition of the words '... suing on behalf of himself and all other shareholders of Sarjana Sdn Bhd except the second defendant' does not alter his locus standi in any way.

The upshot of the issues that I discussed is that the plaintiff's submissions cannot be sustained. Accordingly, I dismiss his claim with costs.

Claim dismissed.

Reported by Mariette Peters-Goh